fuse to testify in spite of the Fifth Amendment.[6] This rule has been carried one step further in requiring a witness to testify before the federal grand jury, although the immunity extended to him by the federal statute did not extend to prosecutions in a State court;[7] and, conversely, the fact that an immunity granted to a witness under a State statute would not prevent a prosecution against him under a federal statute was held not to render the State legislation unconstitutional.[8]

J. N. E.

EVIDENCE—ADMISSIBILITY IN A CIVIL SUIT OF TESTIMONY GIVEN AT A PREVIOUS CRIMINAL TRIAL—The question as to the admissibility of testimony given at a criminal trial by a witness since deceased, in a subsequent civil action, involving substantially the same issue, between parties who had been prosecuting witness and defendant in the former proceeding, has given rise to conflicting opinions. Such evidence was admitted in two recent cases, the courts proceeding, however, upon different theories.

In the case of *Ray* v. *Henderson*,[1] one of these recent decisions, the following facts were involved. A civil action for damages for assault and battery was brought by a person who had already prosecuted the defendant criminally for a felonious assault based upon the same injury. The plaintiff sought to introduce testimony, given at the preliminary hearing before a magistrate by a witness who had subsequently died. The court said: "We have examined a number of articles in different text-books on this question, and believe that the rule relative to this class of evidence is fairly well stated . . . thus: 'Facts may be established by evidence thereof given on a former trial provided the court is satisfied: (1) That the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) that the issue is substantially the same in the two cases; (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; and (4) that a sufficient reason is shown why the original witness is not produced.'" The court concluded that the necessary elements of this rule were satisfied by the facts of the case at bar with the possible exception of the requirement of identity of parties—a requisite

[6] Brown v. Walker, 161 U. S. 591 (1895). Mr. Justice Brown, speaking for the Supreme Court, here said, "When examined, the cases will all be found to be based upon the idea that if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else and much less that it shall be made use of as a pretext for securing immunity to others."

[7] Hale v. Henkel, 201 U. S. 43 (1906), where Mr. Justice Brown further said that "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty".

[8] Jack v. Kansas, 199 U. S. 372 (1905).

[1] 144 Pac. Rep. 175 (Okla. 1914).

troublesome to other courts which, when confronted with the same problem, sought to apply an "orthodox" rule, similarly framed. In what appears to be the earliest case[2] in which the subject was considered by an appellate court, evidence given at a criminal trial for the forgery of a promissory note was held to be inadmissible in a subsequent civil action brought against the maker by the payee, who had been convicted of the forgery. The reason for this conclusion was set forth as follows: "A criminal prosecution, although instituted by an individual, is not in any sense an action between the persons instituting it and the prisoner. . . . The issue is between the government and the prisoner on a question of the guilt or innocence of the latter. It is not a question of property. Very different is the issue, as also the parties in a civil suit to recover on the forged instrument. Then the defendant is clear of the obligation, let the forgery be by whom it may, and the guilt or innocence of the plaintiff is not necessarily involved." However, in another early case,[3] in which the facts were identical with those in *Ray* v. *Henderson*,[4] similar evidence was admitted on the more logical ground that "the parties were for this purpose, substantially the same. The defendant was there *in propria persona* and the plaintiff, the injured party, represented by his protector, the State".

In the case of *North River Insurance Company* v. *Walker*,[5] another recent case, the question under discussion arose in the following manner. An action was brought on a fire insurance policy by the administratrix of the insured. The insurance company defended on the ground that the insured had set fire to the property, and sought to introduce testimony, tending to prove this fact, which had been given at a preliminary hearing of the latter upon a criminal charge of arson. The court admitted this evidence primarily upon the authority of Professor Wigmore's discussion of this subject. According to him, "There is no privity between the parties to a criminal prosecution and a civil action for the same injury, yet testimony given at the former ought to be admitted in the latter."[6] "The requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue. It then ought to suffice to inquire whether the former testimony was given upon such an issue that the party opponent had the same interest and motive in his cross-examination that the present opponent has."[7]

It seems obvious that Professor Wigmore's test, by which the admissibility of evidence given at a former trial depends essentially

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[2] Harger v. Thomas, 44 Pa. 128 (1862).

[3] Gavan v. Ellsworth, 45 Ga. 283 (1872). *Accord:* Charlesworth v. Tinker, 18 Wis. 633 (1864); Krueger v. Sylvester, 100 Ia. 647 (1897); Heatley v. Long, 135 Ga. 153 (1910).

[4] *Supra*, n. 1.

[5] 170 S. W. Rep. 983 (Ky. 1914).

[6] Wigmore on Evidence, vol. 2, p. 1735.

[7] *Id.*, p. 1733.

upon an adequate opportunity for cross-examination, is far more logical and satisfactory than the arbitrary "orthodox" test which has previously been set forth. The application of the latter is apparently the cause of the conflict in the cases, some of which, as already noted, are strict in requiring a precise identity of parties, while others strain to prove that there is an identity of parties between the prosecuting witness and the defendant of a criminal action, and the plaintiff and defendant of a civil action involving the same issue. The case of *Ray* v. *Henderson*[8] recognized "a growing tendency to make the test as to the admissibility of such evidence, depend upon the right and opportunity to cross-examine. We think this test, most assuredly, should be applied, but not to the exclusion or even to the diminution in value, of the other essentials, such as reasonable identity of issues and parties". Such a view is not essentially different from Professor Wigmore's. However, as late as 1911, the Supreme Court of Illinois,[9] though the latter's test was pressed upon it, applied the reactionary doctrine that there must be a precise identity of parties and issues. The Illinois court said: "If the rule contended for were good law, then in an action by a passenger for a personal injury the testimony of a witness since deceased would be admissible against the same carrier for an injury sustained in the same accident by another passenger, an employee, a licensee, or a trespasser, simply because the carrier against whom the testimony was offered had on a former trial an opportunity to cross-examine the witness. This rule would carry us far afield and we cannot sanction it." It seems, however, that an application of Professor Wigmore's rule would not lead to any such conclusion.

The converse of the situation under discussion, namely, whether testimony given in a civil suit should be admitted in a subsequent criminal action relating to the same, has been presented in a few cases. The Supreme Court of Oklahoma[10] refused to admit testimony so given, although the same court, as has been already indicated,[11] reached a contrary conclusion where the former trial was criminal, and the latter, civil. The great weight of authority holds that the constitutional right of confrontation is not violated by the admission in a criminal trial of the former testimony of a deceased

[8] *Supra*, n. 1.

[9] McInturff v. Ins. Co. of N. Amer., 248 Ill. 92 (1911). The facts of this case are identical with those in North River Ins. Co. v. Walker, *supra*, n. 5, with the single additional fact that in the former case the witness, whose testimony, given at the former trial, was sought to be introduced in the subsequent civil suit, had been murdered for so testifying by the defendant in the criminal action. For a criticism of the Illinois case, see 6 ILL. LAW REV. 136.

[10] Watkins v. U. S., 5 Okla. 729 (1897). In this case, the defendant offered in evidence the testimony given at the former civil action. In Luckie v. State, 33 Tex. Cr. 562 (1894), the state attempted to introduce similar evidence, which was also excluded. *Contra:* Tichborne Case, charge of Cockburn, C. J., II, p. 305; State v. N. O. Waterworks, 107 La. 1 (1901).

[11] *Supra*, n. 1.

witness.[12] The same considerations should apply whether the first trial was criminal and the second, civil, or *vice versa,* for apparently there are no material differences between the two situations.

A. L. L.

FRAUD AND DECEIT—FIDUCIARY RELATIONSHIP—*Derry* v. *Peek* CRITICIZED—A recent decision of the House of Lords is interesting for its definite limitation and implied disapproval of the English rule that requires proof of actual fraud, with knowledge of the falsity of the representations, to support an action of deceit. This rule is laid down in the leading case of *Derry* v. *Peek*[1] and is followed by many American jurisdictions.[2]

The case in question involves the peculiar relationship of solicitor and client, and it is this circumstance that induces the court to distinguish the case and place it beyond the scope of the well-established doctrine that generally prevails. Lord Ashburton, the plaintiff, upon the advice of his solicitor, the defendant, had advanced a large sum of money to another of the latter's clients, with a mortgage as security. The defendant later acquired a second mortgage on part of the property and by his representations induced the plaintiff to release that part, to his ultimate damage in a large amount. There was gross negligence on the part of the solicitor and his conduct was reprehensible to a degree, but there was no evidence of actual knowledge on his part that his statements were untrue nor no proof of an intent to cheat, so as to support a conviction under the English rule. The trial court so found and dismissed the action, after pointing out that, though it had been clearly established that the defendant had advised the plaintiff badly and had fallen short of his duty as a solicitor to his client, a case based on fraud could not be turned into an action on the case for damages. The Court of Appeals, however, reversed the lower court's decision on the ground that there was evidence enough of actual fraud, but the House of Lords has taken the position that this can not be supported by the testimony, and that the plaintiff should be allowed to recover notwithstanding, on the ground that the relationship was one of a fiduciary character, to which the strict rule of *Derry* v. *Peek* should not apply.[3]

It is instructive and interesting to trace the process of reasoning by which the Lord Chancellor, Viscount Haldane, arrived at his conclusion and justified his decision. He realizes that the position

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[12] Barnett v. People, 64 Ill. 325 (1870); Owens v. State, 63 Miss. 450 (1886); U. S. v. Macomb, 5 McLean, 286 (1851). *Contra:* Cline v. State, 36 Tex. Cr. 320 (1896).

[1] Peek v. Derry, 14 App. Cases, 337 (Eng. 1889).

[2] Dilworth v. Bradner, 85 Pa. 238 (1877); Wimple v. Patterson, 117 S. W. Rep. 1034 (Texas, 1909); Kreutz v. Kennedy, 147 N. Y. 124 (1895).

[3] Nocton v. Lord Ashburton, 111 Law Times, 641 (Eng. 1914).